

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DG,		: NO.10 – 20,234
	Petitioner	: PACSES NO. 741111506
	vs.	:
		: DOMESTIC RELATIONS SECTION
DG,		:
	Respondent	: Exceptions

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order of August 16, 2010.¹ Argument on the exceptions was heard December 21, 2010.

In response to Petitioner's request for child support and spousal support/APL, the hearing officer assigned both parties an earning capacity: Petitioner's earning capacity was based on prior employment and her current efforts to obtain employment, and Respondent's earning capacity was based on expenses being paid by him on a monthly basis. Each party has excepted to the determination of the hearing officer respecting his or her earning capacity, and further, Petitioner complains regarding the earning capacity attributed to Respondent and a deviation awarded due to payment of the mortgage on the residence in which she lives, and Respondent complains that he should have received credit for certain of Petitioner's bills he has been paying and that he should have received credit for paying Petitioner's health insurance premiums. Each of these issues will be addressed in turn.

With respect to Petitioner's earning capacity, the hearing officer assessed her with the lowest hourly wage she has earned as an LPN, \$16.00, for a forty-hour work week. Although Petitioner testified she has been unable to find a job

¹ Although Petitioner incorrectly filed her exceptions to the divorce case, No. 10-20,734, the Court will consider them as having been filed to the instant matter. By copy of this Order, the Prothonotary is directed to remove the exceptions from the docket of No. 10-20,734 and instead docket them to the instant matter.

which pays \$16.00 per hour, she admitted that she has not applied at several large facilities where she might be able to find such work, and that she has limited her search to first-shift hours. The Court believes the hearing officer's assessment is appropriate as it is clear that Petitioner is not working up to her potential, nor making reasonable efforts to obtain suitable employment.

With respect to Respondent's earning capacity, after determining that the parties' 2009 federal income tax return showed that Respondent had a monthly net income of \$4078.18, the hearing officer observed that Respondent testified that he was able to pay \$5985.90 each month toward personal expenditures and that only the real estate taxes were delinquent. She therefore found his monthly net income for support purposes to be \$5985.90. Petitioner claims that it should be higher because Respondent testified to other expenses which the hearing officer failed to include. Respondent argues that the method is faulty because the mortgage expense is paid by the business. The Court agrees with Respondent. Although the hearing officer said she was including only personal expenditures and not those expenses which were paid by Respondent as business owner, she did indeed include the entire mortgage payment, part of which is attributable to the business property, thus blending business expenses with personal expenses but without also considering his business income (gross receipts) as well as all of the business expenses. The hearing officer also did not consider his testimony that he had received "a couple thousand dollars" from his father. N.T., July 15, 2010, at p. 33.

The Court believes the more appropriate method to estimate Respondent's true income is to add back to the business income shown on the tax return the portion of the mortgage expense which is attributable to real estate other than the business property, and to deduct from the rental income the portion of the

mortgage expense which is attributable to the rental property. Fortunately, Respondent's testimony provides the Court with a basis upon which to do this: Respondent testified without contradiction that the marital residence is worth \$360,000 to \$400,000, the office property is worth \$300,000 to \$350,000 and the rental property is worth approximately \$100,000. N.T., July 15, 2010, at p. 25. Averaging the marital residence at \$380,000 and the office at \$325,000, the total value of all three properties is \$805,000. Since the mortgage covers all three properties, the Court can estimate that 40.4% of the mortgage expense of \$39,795, or \$16,077, is properly attributable to the office property. Similarly, the Court can estimate that 12.4% of the mortgage expense, or \$4,935, is attributable to the rental property. Therefore, Respondent's business income can be estimated at \$71,292 (by adding back the mortgage expense attributable to the rental property and the marital residence) and his rental income can be estimated at \$1257 (by deducting the mortgage expense attributable to the rental property since all had been deducted from the business income and none from the rental income). After adding back depreciation on the rental property of \$2,871, Respondent has a total gross income of \$75,420. He paid \$8,627 in federal income and self-employment taxes,² and it is estimated that he would have paid \$1,613 in state income tax (3% of \$53,766) and \$714 in local earned income tax (1.5% of \$47,574). Therefore, Respondent's annual net income is estimated to be \$64,466, or \$5,372 per month.

Respondent also excepts to the hearing officer's failure to consider his testimony that he expects a lower income due to a change in his commission

² To calculate Respondent's share of the taxes paid by the parties for tax year 2009, the Court deducted from the total income, \$69,694, that income attributable to both parties: \$16, -\$354 and \$224, or a total of -\$114. The remainder, \$69,580 was apportioned by dividing Respondent's share, \$53,766, by \$69,580, to arrive at 77%. Application of that percentage to the tax paid by the parties, \$2,474, resulted in Respondent's share of \$1905 and then his self-employment tax of \$6,722 was added to arrive at a total federal tax obligation of \$8,627.

agreement effective July 1, 2010. Since Respondent did not provide any specific information, the hearing officer was correct to ignore what amounts to speculation. Respondent is, of course, free to seek modification once he has actual proof that his income has decreased.

Petitioner excepts to a deviation awarded by the hearing officer to consider that Respondent pays the mortgage on the marital residence in which she resides. Since the Court is recalculating the support amounts and is not including a deviation, this exception is considered moot.

With respect to Respondent's claim that he should have received credit for certain of Petitioner's expenses he was paying pursuant to an agreement of the parties memorialized in the Order of April 16, 2010,³ the Court finds support for such claim in both the Order of April 16, 2010, and the Order of July 20, 2010. On April 16, 2010, the parties agreed that Respondent would continue to pay the mortgage, utilities, and all other "status quo" bills associated with the marital residence, and that if it was later determined that his support obligation to Petitioner exceeded the value of those expenses, he would receive the appropriate credit.⁴ By Order dated July 20, 2010, entered after the hearing held July 15, 2010, Respondent was directed to pay \$1200 per month on an interim basis effective July 19, 2010, and informed that he had no further obligation to pay the various utility bills for the marital residence. Thus, Respondent is indeed entitled to consideration of the expenses he paid on Petitioner's behalf prior to July 19, 2010. Respondent testified to paying expenses totaling \$500 per month, N.T., July 15, 2010, at p. 29, plus the mortgage payment, \$1833 per month of which the Court has estimated covers the marital residence (47.2% of \$3,882 per month).

³ Although in his exceptions Respondent references an Order of August 16, 2010, it is clear from the record that the order containing the referenced agreement is dated April 16, 2010.

⁴ Apparently, if the support amount was less than the expenses paid, he would not be able to seek reimbursement.

As these expenses exceed the APL calculated infra, the Court will provide Respondent credit by making any APL payment effective only as of July 19, 2010.

Finally, Respondent claims he should have been given credit for health insurance premiums he pays on Petitioner's behalf. Unfortunately for Respondent, however, he did not provide specific information to the hearing officer to enable her to calculate an appropriate credit. It appears the premiums are paid out of business income and may be deducted from business income for tax purposes. Considering the totality of the circumstances, the Court will not allow credit at this time.

Accordingly, considering Petitioner's earning capacity of \$2,218 per month and Respondent's income of \$5,372 per month, Respondent has an obligation for the support of the parties' minor child of \$847.24 per month and APL is calculated at \$692.10 per month. Since Respondent pays \$1,833 per month toward the mortgage on the marital residence in which Petitioner resides, however, the Court will credit that payment toward the APL and will require no further payment. In addition, Respondent should receive credit in equitable distribution for the amount of the mortgage payment which exceeds his APL obligation. If Petitioner were making the payment, however, pursuant to Pa.R.C.P. 1910.16-6(e) she would be entitled to a contribution of up to 50% of the excess amount of the mortgage payment over 25% of her income including child support and APL. The Court believes it only fair to deduct this amount from the credit Respondent will receive in equitable distribution. Since Petitioner's income including child support and APL is \$3,757, 25% of which is \$939, and since the mortgage payment of \$1,833 exceeds that amount by \$894, the Court will deduct from Respondent's credit one-half of that amount, or \$447.

He will therefore be entitled to a credit of \$694 per month for all monthly mortgage payments made after July 19, 2010.

ORDER

AND NOW, this 22nd day of December 2010, for the foregoing reasons, the cross-exceptions are hereby granted in part and denied in part. The Order of August 16, 2010, is hereby modified to provide for a payment of child support of \$847.24 per month, effective March 2, 2010. Respondent shall be responsible for 71 % of Petitioner's and the child's excess unreimbursed medical expenses and Petitioner shall be responsible for 29% of such. Respondent's APL obligation is hereby modified to \$692.10 per month, effective July 19, 2010. No payment shall be required, however, as long as Petitioner continues to reside in the marital residence and Respondent continues to make the monthly mortgage payment thereon. Further, Respondent shall receive in equitable distribution a credit of \$694 per month for all mortgage payments made after July 19, 2010. As modified herein, the Order of August 16, 2010, is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Prothonotary
Family Court
Domestic Relations Section
Janice Yaw, Esq.
Michael Morrone, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson